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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN SCOTT WELLS,

Defendant and Appellant.

D072602

(Super. Ct. No. SCN371403)

APPEAL from a judgment of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed and remanded with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

A jury convicted Steven Scott Wells of robbery (Pen. Code, § 211)<sup>1</sup> and found true an allegation he personally used a deadly weapon (a screwdriver) to commit the offense (§ 12022, subd. (b)(1)). The court then found Wells was the defendant in a prior attempted residential burglary case from another county and, after reviewing the record of conviction from the case, the jury found true an allegation Wells was convicted in the case. The conviction qualified as a prior serious felony conviction (§§ 667, subd. (a)(1), 1192.7) and a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). The court sentenced Wells to 12 years in prison.<sup>2</sup>

Wells appealed, contending there was insufficient evidence to support the prior conviction finding because there was insufficient evidence he was the defendant in the out-of-county case. He also contended his trial counsel provided ineffective assistance by failing to object to inadmissible testimony from the investigative technician who compared his booking fingerprints in this case to the booking fingerprints of the defendant in the out-of-county case.

In a prior opinion, we rejected Wells's contentions and affirmed the judgment. The California Supreme Court subsequently denied Wells's petition for review. He currently has a petition for certiorari pending before the United States Supreme Court.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The court also sentenced him to a consecutive term of eight months for violating probation in another case.

(*People v. Wells* (Jun. 14, 2018, D072602) [nonpub. opn.], review den. Aug. 29, 2018, petn. for cert. pending, petn. filed Nov. 27, 2018.)

Meanwhile, Wells filed a motion to recall the remittitur, which we granted, to address the application of recent amendments to sections 667, subdivision (a), and 1385, subdivision (b), which took effect on January 1, 2019, and give courts the discretion to dismiss the punishment for prior serious felony convictions. Wells contends, the People concede, and we agree the amended statutes apply retroactively to this case. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th, 299, 307–308 & fn. 5 (*Lara*); *People v. Francis* (1969) 71 Cal.2d. 66, 75–76 (*Francis*); *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 (*Garcia*).) Consequently, we vacate the sentence and remand the matter to allow the court an opportunity to exercise its discretion under the amended statutes.

## II

### BACKGROUND

#### A

Wells walked out of a pharmacy store with a 30-count package of beer without paying for it. The store's assistant manager followed Wells outside and asked him to return the beer. When Wells refused, the assistant manager swiped at the package to keep Wells from taking it. The package fell to the ground and broke open. Wells picked up four or five cans and then pulled out a screwdriver from his pocket. He held the screwdriver in his fist with the top pointed at the assistant manager. He told the assistant manager to go back inside the store and he fled with the cans he picked up off the ground.

## B

When Wells was arrested in this case, he was booked under the name "Steven Scott Schultz" with a birthdate of October 23, 1985. At two later arraignments, he confirmed his true name was Steven Scott Wells and his true birthdate was August 21, 1985. The defendant in the out-of-county case was charged under the name "Steven Wentz Wells," signed a guilty plea form under the name "Steven Wells," and claimed his birthdate was August 21, 1985.

An investigative technician from the district attorney's office testified she compared the booking fingerprints from this case to the booking fingerprints from the out-of-county case using the ACE-V (Analysis, Comparison, Evaluation, and Verification) methodology. She first determined the fingerprints were of sufficient quality and clarity to compare. Then, she compared and evaluated only the thumbprints and determined they had at least 12 common characteristics. Consequently, she opined the two sets of fingerprints were from the same person.

Had the investigative technician been the first to compare the fingerprints, the fingerprints would have gone to a second investigative technician for verification. In this instance, she was the verifier. The verification was not a blind verification. The fingerprints came to her with initials from the first investigative technician, indicating the first investigative technician found they matched. Nonetheless, she approached the comparison as if she were the first person to receive the fingerprints and she compared a different finger than the first investigative technician.

The investigative technician did not keep notes of how many common characteristics she found, but she never opines that fingerprints match unless they share at least 12 common characteristics because she wants to be 100 percent certain of the match. She also did not mark any of the common characteristics she found. Consequently, no one would be able to look at her work and see exactly what common characteristics she found.

### III

#### DISCUSSION

##### A

Wells contends there was insufficient evidence to support a finding he was the defendant who suffered the prior out-of-county conviction. We review the court's identity finding for substantial evidence. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1190.)

Here, the court's identity finding was supported by the testimony of the investigative technician who compared Wells's booking thumbprints from this case to the booking thumbprints from the defendant in the out-of-county case and opined the thumbprints matched. The evidence was corroborated by Wells's true birthdate, which matches the birthdate of the defendant in the out-of-county case. However, even absent corroboration, fingerprint comparison evidence provides strong evidence of identity and is usually sufficient by itself to identify a defendant. (*People v. Johnson* (1988) 47 Cal.3d 576, 601.)

Wells asserts we should discount the investigative technician's opinion because it was purely conclusory. We disagree with this characterization. The investigative technician explained her education, training, and experience; the methodology she used to determine whether the thumbprints matched; the uniqueness of fingerprints; and her minimum threshold for determining a match. This testimony provided an adequate foundation for the investigative technician's opinion. (See *People v. Rivas* (2015) 238 Cal.App.4th 967, 981 (*Rivas*) [testimony by a trained fingerprint analyst explaining the process she used to compare fingerprints and reach a conclusion provides an adequate foundation for fingerprint comparison evidence].)

Although the investigative technician did not write any notes about her examination or mark the specific common characteristics she found, this did not preclude Wells from challenging her opinion. "A defendant may respond to fingerprint evidence by challenging the training of the fingerprint expert ..., by challenging the process by which the fingerprint expert made the comparison ..., or by showing that the fingerprints do not match, either by calling the defense's own expert or simply showing the [trier of fact] where they do not match ... ." (*Rivas, supra*, 238 Cal.App.4th at p. 978.)

The absence of notes and marks also did not mandate a finding in Wells's favor. Rather, the absence of notes and marks went to the weight and credibility of the investigative technician's opinion. We do not reweigh evidence or reevaluate the credibility of witnesses on appeal. (*People v. Reed* (2018) 4 Cal.5th 989, 1006–1007.)

## B

Wells next contends his trial counsel provided ineffective assistance by failing to object to the investigative technician's testimony about her role as a verifier of another investigative technician's findings, as the other investigative technician's findings were inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665. Assuming, without deciding, the testimony was inadmissible under the *Sanchez* case, we are not persuaded the failure to object requires reversal of the prior conviction findings for several reasons.

First, most of the testimony on this point was elicited by defense counsel, not the People. Second, we may not reverse a court's judgment for ineffective assistance of counsel unless there is affirmative evidence in the record showing counsel had no rational tactical purpose for counsel's claimed action or omission. (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) Wells has not identified any such affirmative evidence. Finally, defense counsel's rational, tactical purpose for not objecting to the testimony was readily apparent from his questions and arguments: he was trying to establish the investigative technician's opinion was tainted by her coworker's earlier determination. While the tactic was ultimately unsuccessful, the lack of success did not render the tactic irrational.

## C

Finally, Wells contends, the People concede, and we agree we must remand the matter for a hearing to allow the court to consider whether to exercise its newly conferred discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to dismiss the punishment for the serious felony prior conviction. The amended sections apply retroactively to this case. (*Lara, supra*, 4 Cal.5th at pp. 307–308 & fn. 5; *Francis*,

*supra*, 71 Cal.2d. at pp. 75–76; *Garcia, supra*, 28 Cal.App.5th at p. 973.) When a court is unaware it had the discretion to reduce a sentence, "[r]emand is required unless the record reveals a clear indication that the [court] would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]" (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) No such clear indication is revealed in this case. Accordingly, we shall remand the matter for further proceedings under the amended sections.

#### IV

#### DISPOSITION

The sentence is vacated and the matter is remanded to the superior court with directions to conduct a hearing to consider whether to exercise its newly conferred discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to dismiss the punishment for the prior serious felony conviction. If the court elects not to dismiss the punishment for the prior serious felony conviction, the court shall reinstate the sentence. If the court elects to dismiss the punishment for the prior serious felony conviction, the court shall resentence Wells. The court shall then prepare an amended



abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.